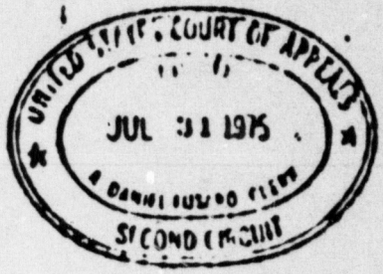
United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 75-4058

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT



UNDERHILL CONSTRUCTION CORPORATION,

Petitioner,

v.

SECRETARY OF LABOR and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

B

P/S

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNDERHILL CONSTRUCTION CORPORATION,

Petitioner,

v.

JOHN T. DUNLOP, SECRETARY OF LABOR,
and
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION,

Respondents

ON PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether Underhill was exempt from OSHA construction standards because its construction contract had been negotiated prior to April 1971, despite the fact that employers' OSHA duties are statutory rather than contractual.

COUNTERSTATEMENT OF THE CASE

1. Nature of the Case

This case is before the Court pursuant to section 11(a) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.) on Underhill's petition to review an order of the Occupational Safety and Health Review Commission issued against it January 31, 1975 (A. 37). This Court has jurisdiction under 29 U.S.C. 660(a), the cited violations having occurred in New York City.

2. Pertinent evidence

A. Regulatory background

This case involves the Secretary's adoption under OSHA of established Federal standards previously promulgated by him pursuant to the Construction Safety Act of 1969 (CSA) (P.L. 91-54, 40 U.S.C. 327 et seq.). 1/ CSA section 107(a)

1/ Also known as the Contract Work Hours and Safety Standards Act (CWHSSA).

authorized the Secretary to promulgate mandatory job safety and health standards applicable to Federal and Federally-assisted contract construction and required that it "shall be a condition of each contract which is entered into [for construction work on such projects that] contractors or subcontractors [shall comply with these standards] in the performance of the contract." 40 U.S.C. 333(a); see S. Rept. 91-320, 1 U.S. Code Cong. and Admin. News 1071 (1969). On April 17, 1971, after notice, public hearings, and extensive consideration by an Advisory Committee composed of representatives of affected interest groups, the Secretary accordingly promulgated comprehensive construction safety and health standards applicable to all CSA-covered contracts. 29 CFR Part 1518, 36 Fed. Reg. 7340. However, these standards afforded covered contractors the equivalent of a delayed effective date by providing they would only apply to contracts "for which negotiations are commenced on or after 10 days following [the standards'] publication," stating that "The time lag in the procurement process, together with the [delayed] time periods specified, are considered sufficient to afford affected persons reasonable time to take such action as may be necessary to comply with the rules." 29 CFR 1518.1050, 36 Fed. Reg. 7340, 7410.

In the interim, on April 28, 1971, OSHA became effective. Unlike CSA, OSHA coverage was based on the commerce power rather than individual employers' contractual obligations

with Federal Government, and required all employers affecting commerce to "comply with occupational safety and health standards promulgated under this Act." 29 U.S.C. 652(5), 654(a)(2). OSHA section 6(a) partly implemented this statutory obligation by directing the Secretary swiftly to promulgate without notice and hearing, "any established Federal standard, unless he determines that * * * promulgation * * * would not result in improved safety or health for specifically designated employees." 29 U.S.C. 655(a). 2/ In accord with this directive the Secretary on May 29, 1971 declared these CSA standards to be established Federal standards and promulgated them under OSHA effective August 27,

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2/ See 29 U.S.C. 652(8) and (10), defining a "standard" as something which "requires conditions, or the adoption or use of one or more practices * * * reasonably necessary or appropriate to provide safe or healthful employment" and an "established Federal standard" as "any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act."

This 6(a) power expired April 28, 1973, two years after the Act's effective date. Its purpose was "to establish as rapidly as possible national occupational safety and death standards with which industry is familiar [and which] * * * will be useful for immediate providing a nationwide minimum level of health and safety" by directing the Secretary to issue under OSHA standards which had previously "been issued under other Federal statutes [and] * * * have already been subjected to the procedural scrutiny mandated by the law under which they were issued." Committee Print, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92nd Cong. 1st Sess. 145-146, 846-847, 1186-87 (June 1971) (hereafter "Leg. Hist.").

1971. 36 Fed. Reg. 10466. In support of this promulgation the Secretary stated that "The established Federal standards are [inter alia] * * * occupational safety and health standards in effect on April 28, 1971 and established by the Department * * * pursuant to section 107 of the [CSA]"; that the effective date of such standards under OSHA was "delayed for 90 days, but only for employers and employments not subject to any of the statutes listed in the proceeding paragraph"; and that the purpose of this delayed effective date was

> to insure that affected employers and employees would be informed of the existence of the standards and of their terms, and to give such employers * * * an opportunity to familiarize themselves with the requirements of the standards before their application. * * * However, for established Federal standards * * * (1) promulgated under any of the statutes listed in the preceding paragraph and (2) applicable to any employer and any employment by virtue of any such statutes, no delay in effective date is provided with respect to such employer and employment. In the case of employers and employments subject to such statutes, familiarity already exists.

Id. 3/ In addition, the Secretary indicated that this August 27 effective date was an outside limit after which OSHA standards would generally apply to all employers affecting commerce, stating that (Id.):

3/ All emphases in quoted material are added by counsel for the respondent unless otherwise indicated.

> The occupational safety and health standard in "this promulgation] shall become effective on August 27, 1971 except: (1) Where additional delays in effective date are specifically provided, and (2) with respect to an employment and place of employment which, on a date before August 27, 1971, is or becomes subject to any safety and health standard prescribed in 29 CFR Part * * * 1518 * * * any corresponding occupational safety and health standard in Subpart B of [this promulgation] * * * shall also become effective, and shall be applicable to such employment and place of employment, on such earlier date. For example, whenever a standard promulgated under the [CSA] and contained in 29 CFR Part 1518 is applicable to an employment and places of employment by virtue of the performance of a construction contract on a date before August 27, 1971, the corresponding standard prescribed by section 1910.12 of [this promulgation] shall also become effective on the same date * * *. 4/

The promulgation itself formally defined "employer" and "standard" in the statutory language, 36 Fed. Reg. 10467-68; stated that it was intended to "adopt, and extend the applicability of, established Federal standards * * * to every employer, employee, and employment covered by the Act"; and specificially noted with respect to "Construction work" that

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4/ The "additional delays in effective date" referred to in this passage were listed in a preceding paragraph of the promulgation's preamble and did not include 1518.1050. Id. See infra, n. 10.

> The standards prescribed by Part 1518 of this title and in effect on April 28, 1971, are adopted as occupational safety or health standards under section 6(a) of the Act and shall apply * * * to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed by this paragraph.

29 CFR 1910.11, 1910.12(a), 36 Fed. Reg. 10468-69. 5/

On February 17, 1972 the Secretary clarified his previous adoption of CSA standards under OSHA by adding to 29 CFR 1910.12 a new paragraph (c) which expressly noted that neither non-substantive CSA rules, nor substantive CSA regulations which were inapposite to OSHA duties, were adopted by the prior rulemaking. That paragraph was headed "Construction Safety Act distinguished" and stated both that it adopted only "the standards (substantive rules) * * * in Subpart C and the following subparts of Part 1926" and that it

> does not incorporate Subparts A and B of Part 1926 [relating to CSA procedures and the scope of employers' CSA obligations because] * * * Subparts A and B have pertinence only to the application of section 107 of [CSA]. For example, the interpretation of the term "subcontractor" in * * * section 1926.13[(c)] * * * is significant in discerning the coverage of the Construction Safety Act and duties thereunder. However, the term "subcontractor" has no significance in the application of the [Occupational Safety and Health] Act, which was enacted under the Commerce Clause and which establishes duties for "employers" which are not dependent for their application upon any contractual relationship with the Federal Government or upon any form of Federal financial assistance.

29 CFR 1910.12(c), 37 Fed. Reg. 3512.

5/ 29 CFR Part 1518 was redesignated 29 CFR Part 1926 in December 1971; is referred to as Part 1926 in all subsequent promulgations; and is hereafter referenced as 29 CFR 1926. See 36 Fed. Reg. 25232 (Dec. 30, 1971).

And in December 1972 the Secretary further clarified the fact that he had not adopted under OSHA those parts of the pre-existing CSA regulations which were inconsistent with OSHA and the purpose of section 6(a), stating:

> It bears emphasis that only standards (i.e., substantive rules) relating to safety or health are adopted by any incorporations by reference of standards prescribed elsewhere in this chapter or this title. Other materials contained in the referenced [parts] are not adopted. Illustrations of the types of materials which are not adopted are * * * the discussion in [Parts 1915 through 1918] of the coverage of the Longshoremen's and Harbor Workers' Compensation Act or the penalty provisions of [that] Act. Similarly, the incorporation by reference of Part 1926 in section 1910.12 is not intended to include * * * interpretative rules having relevance to the application of the Construction Safety Act, but having no relevance to the application [of] the Occupational Safety Health Health Act.

29 CFR 1910.11(b), 37 Fed. Reg. 26008 (Dec. 7, 1972).

B. Facts found by the Commission

The pertinent facts are undisputed. Underhill is a large concrete construction corporation which in late 1970 subcontracted with the general contractor for Waterside Developments, a federally assisted Manhattan apartment building, to erect concrete on that project (A. 10, 22, 41-42). On June 14, 1972 an OSHA compliance officer routinely inspected this worksite and observed numerous Underhill employees stripping concrete forms at and near the edges of the eighteenth through the twentieth floors of a building under construction (A. 41-42;

Tr. 14-15). [6] The floors were completely unguarded; the employees were not protected against falls by any other means; and a fall from the heights at which they were working would have meant certain death (A. 42; Tr. 12-13, 21, 87).

3. Administrative proceedings

As a result of the above inspection the Secretary on July 18, 1972 cited Underhill for a serious violation of section 5(a)(2) of the Act for permitting its employees to work on open-sided floors up to 200 feet above ground without protection against falls (A. 4-5, 9-11, 27). [7] Underhill was

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6/ "Tr." references are to the hearing transcript lodged with the Court as part of the original record. Petitioner neither designated parts of the record to be printed in the appendix nor afforded the Secretary an opportunity to designate, but simply filed its appendix with its brief. Cf. Fed. R. App. P. 30(a) and (b). In view of the purely legal question presented, the Secretary has referenced the original document rather than enlarging this brief by reproducing transcript portions in an addendum.

7/ Section 5(a)(2), 29 U.S.C. 654(a)(2), provides that every employer affecting commerce "shall comply with occupational safety and health standards promulgated under this Act. 29 CFR 1926.500(d)(1), the pertinent construction safety standard, requires "Every open-sided floor or platform 6 feet or more above adjacent floor or ground level" to be "guarded by a standard railing, or the equivalent, * * * on all open sides * * *." See 29 U.S.C. 666(b) and (j); cf. 29 U.S.C. 666(c). An identical Underhill violation was before this Court in Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032 (1975), where Underhill had raised the same "exemption" defense before the Commission but abandoned it on appeal.

Underhill was additionally cited for four nonserious violations of other construction standards, which were not contested and are not before the Court on this appeal (A. 4, 12-13, 37 n. 1). See 29 U.S.C. 659(a).

also served with a proposed penalty of $700 for this violation and ordered to abate the cited hazard immediately (A. 5-6). The company timely contested this citation pursuant to 29 U.S.C. 659(c); the Secretary's formal complaint and Underhill's answer before the Commission followed (A. 8, 18); and the case was heard by an administrative law judge of the Commission on January 10, 1973 (A. 28). At this hearing the company disputed neither the facts constituting the asserted violation nor the danger to its employees, but principally contended that it was wholly exempt from OSHA construction standards in 29 CFR 1926 because its Waterside contract had been negotiated prior to April 1971 (A. 21-23). The judge's decision adopting this contention and vacating the Secretary's citation issued May 23, 1973 (A. 27). The Secretary successfully petitioned for discretionary review by the full Commission pursuant to 29 U.S.C. 661(i)(A. 33-36); and the Commission's decision reversing its judge and affirming the citation and proposed penalty (A. 37) was entered thereafter.

4. Decisions below

On the above record the Commission judge vacated the Secretary's citation without reaching the merits because Underhill "was not, as a matter of law, subject to the [OSHA] construction standards" (A. 28). In support of this result, the judge merely stated that 29 CFR 1926.1050 limited application of the CSA standards to contracts negotiated after April 1971; that this provision was not specifically excluded by 29 CFR 1910.12(c),

OSHA promulgation adopting these CSA standards; that this contractual CSA "exclusion" therefore "must be applied to the Safety and Health Act"; and that because the Waterside contract had been negotiated before April 1971, that "exclusion" wholly excepted Underhill's Waterside activities (A. 28-31). He accordingly held that Underhill was free to leave its employees unprotected for the life of the Waterside contract, despite his recognition that the CSA standards "were initially promulgated * * * under an entirely different Act * * * unrelated to the Act under which we function" and that (A. 29):

> whereas these standards under the Construction Safety Act relate only to Federal and Federally assisted constuction contracts, 29 CFR 1910.12 provides no such limitation with respect to the Safety and Health Act. Rather, it directs their applicability under the Safety and Health Act to "every employment and place of employment of every employee engaged in construction work."

On review the Commission reversed over Chairman Moran's dissent, holding that 29 CFR 1910 adopted only "established Federal standards" as specifically defined therein; that 29 CFR 1926.1050 was neither a "standard" nor an "established Federal standard" under these definitions, but an "exception" related to delayed contractual effective dates; and that to hold it limited employers' OSHA duties would contravene the Act's goals by permitting employers to escape OSHA obligations rather than requiring broad-based compliance therewith (A. 40):

> Clearly, by its own terms section 1926.1050 is not an "occupational safety and health standard." It does not require affirmative action to provide safe and healthful employments and places of employment. On the contrary, it operates an an exception [based on contractual circumstances irrelevant under OSHA]. And were we to adopt Underhill's position the result would be the opposite of that required by an "occupational safety and health standard." Since by the terms of section 1910.11 and 1910.12 [the Secretary] only promulgated standards under OSHA and*** section 1926.1050 is not a standard***Underhill was required to conform its practices to the requirements of the construction safety and health standards.

The Commission majority accordingly affirmed the Secretary's citation and proposed penalty on the merits, noting that "Underhill conceded its employees were exposed to the [cited] hazard" and "a fall from any of the unguarded levels involved herein would almost certainly result death" (A.41-42).

Underhill's petition for review by this Court followed.

ARGUMENT

THE COMMISSION CORRECTLY CONCLUDED PETITIONER'S CONTRACTUAL RELATIONS DID NOT EXEMPT IT FROM OSHA SAFETY STANDARDS

1. As detailed supra, in July 1972---nearly a year after the OSHA standards' general August 27, 1971 effective date "with respect to every employer***and employment covered by the Act"---the Secretary cited Underhill under 29 CFR 1926.500(d)(1) for exposing its Waterside workers to 200-foot falls without guardrails or equivalent protection. 8/ The uncontroverted evidence supported this citation, and the Commission agreed with the Secretary that the contractually-based delayed effective date of 29 CFR 1926.1050 neither precluded him from enforcing OSHA safety standards on Underhill's project nor left Underhill free to ignore those standards after August 27, 1971. Underhill now contends that this result was erroneous and that 1926.1050 exempted it from any duty to comply with OSHA construction standards. This contention is untenable, and the instant order should be affirmed.

2. We initially note the courts' repeated holdings that the Secretary's reasonable interpretations of this statute are entitled to "great deference"; that where as here the Secretary's implementing regulation is involved his interpretation

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8/ This Court has frequently examined the Act's operation in enforcement contexts, which need not be reiterated here. E.g., Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032 (C.A. 2, 1975); REA Express, Inc. v. Brennan and OSHRC, 495 F.2d 822 (C.A. 2, 1974); Brennan v. OSHRC and John J. Gordon Co., 492 F.2d 1027 (C.A. 2, 1974); Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340 (C.A. 2, 1974). See generally National Realty and Const'n. Co. v. OSHRC and Secretary, 489 F.2d 1257 (C.A. D.C., 1973).

is controlling even if it is not the only or most reasonable one; and that "the Commission's interpretations regarding the meaning of the Act should [also] be given substantial deference." E.g., Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Brennan v. OSHRC and Kesler and Sons Const'n. Co., 513 F.2d 553, 554 (C.A. 10, 1975); Brennan v. OSHRC and Republic Creosoting Co., 501 F.2d 1196, 1198-1199 (C.A. 7, 1974). 9/ Thus, whatever the effect where the two agencies differ, their reasonable interpretation of implementing regulations should be virtually dispositive where their position is the same. The Budd Co. v. OSHRC, 513 F.2d 201, 204-205, (C.A. 3, 1975). We demonstrate below that the agencies' interpretation of 1926.1050 and these successive CSA and OSHA promulgations was not only reasonable, but required.

3. In the first place, the Secretary's promulgations facially indicate that 1926.1050 was not meant to be adopted as a limit on enforceability of OSHA construction safety standards. As detailed supra, pp. 2-3 those standards were initially promulgated under CSA with a delayed effective date which was expressly adopted "to afford affected persons reasonable time to take such action as may be necessary to comply with the rules"

9/ Accord: California Stevedore & Ballast Co. v. OSHRC, --- F.2d --- (C.A. 9, No. 73-3103, May 21, 1975), 3 CCH ESHG Para. 19,671; Madden Const'n. Co. v. Hodgson, 502 F.2d 278, 280-281 (C.A. 9, 1974); Brennan v. Southern Contractors Service and OSHRC, 492 F.2d 498, 501 and cases cited (C.A. 5, 1974).

by revising their contract negotiation terms to include the cost of providing workers safety protection. When the Secretary adopted these standards under OSHA section 6(a), he not only stated that he was applying them "to every employment and place of employment of every employee engaged in construction work," 29 CFR 1910.12(a), 36 Fed. Reg. 10469, but established a different OSHA effective date---August 27, 1971 ---for such standards. 36 Fed. Reg. 10466. Moreover, he specifically stated that the purpose of this delayed effective date was to afford employers newly covered under OSHA "an opportunity to familiarize themselves with the requirements of the standards before their application"; that no such delay was intended for employers subject to corresponding established Federal standards previously issued under other statutes like CSA because such "familiarity already exists"; and that this August 27 effective date was accordingly shortened to make the OSHA standards effective immediately with respect to any project covered by CSA standards prior to August 27. Id. In addition to the fact that reading 1926.1050 as a delayed effective date for OSHA construction safety obligations would contravene the Secretary's clear superceding intent to establish August 27 as a general effective date for all employments covered by OSHA, these statements demonstrate that with certain narrow

exceptions not relevant here, [10] August 27 was to be the outside effective date for construction employers' OSHA obligations irrespective of their duties under other statutes operating in a more limited sphere.

Furthermore, the Secretary's subsequent actions unequivocally demonstrate that 1926.1050 was not meant to be adopted under OSHA. The intial OSHA promulgation defined a "standard" as something which affirmatively "requires conditions, or the adoption***of one or more practices***necessary***to provide safe or healthful employment" and stated that "The standards prescribed by Part 1518 of this title [i.e., the CSA regulations] are adopted as occupational safety or health standards under section 6(a) of the Act." 36 Fed. Reg. 10468, 10469. On February 17, 1972

10/ The initial OSHA promulgation explicitly stated that "An additional delay in effective date until February 15, 1972 is provided and codified in the new Part 1910 in sections within Subparts G, H, I, L, N, O, P, R and S in situations where additional time is considered necessary to adjust to the new standards." 36 Fed. Reg. 10466. The cited subparts contained particularly complex or onerous requirements which justified specific further delays before compliance enforcement---a situation not present here. Moreover, neither Subpart C, under which Underhill was cited, nor Subpart X---which contains 1926.1050---was referenced as affording such additional delay. Indeed, the presence of this February 1972 date as an absolute outside limit constitutes further evidence that Underhill was not meant to remain "exempt" until the time of these citations.

the Secretary officially noted that CSA principles were inapplicable to OSHA; that the initial OSHA promulgation was only intended to adopt "the standards (substantive rules) published in Subpart C and the following subparts of Part 1926"; and that even substantive Subpart A and B rules like the definition of a covered "subcontractor" were not adopted because they have

> no significance in the application of the Act, which was enacted under the Commerce Clause and ***established duties for "employers" which are not dependent for their application upon any contractual relationship with the Federal Government.

29 CFR 1910.12(c), supra p. 7. And in December 1972 he re-emphasized that "only standards (i.e. substantive rules) relating to safety or health are adopted [under OSHA]" and that "Illustrations of the types of materials which are not adopted" were

> the incorporation by reference of Part 1926 in [29 CFR] 1910.12 [which] is not intended to include references to***rules having relevance to the application of the Construction Safety Act, but having no relevance to the application [of] the Occupational Safety and Health Act.

29 CFR 1910.11(b), supra, p. 8.

These statements plainly indicate that 29 CFR 1926.1050 was not intended to be adopted under OSHA because it is not a "substantive rule" by the adoption's very terms. Contrary to petitioner's apparent contention (Br., pp. 7-8), they also

confirm that the exclusion of Subparts A and B from OSHA adoption was illustrative rather than exhaustive, and that even if a CSA regulation was "substantive" and appeared in a Subpart other than A or B it was not meant to be adopted under OSHA if it did not square with OSHA's purposes and scope. The contractually-based CSA effective-date provision of 1926.1050 is as inapposite to OSHA as the excluded CSA definition of "subcontractor," and requires the same result. 11/

4. In the second place, to hold the Secretary promulgated 1926.1050 as an express restriction on employers' OSHA responsibilities would be tantamount to holding that he committed an ultra vires act. As the Commission noted (A. 38,40), OSHA section 6(a) pertinently empowered the Secretary to promulgate

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11/ Relying on a single choice-of-law case, Underhill asserts Br., p. 7) that 1926.1050 is "substantive" and was therefore adopted by these OSHA promulgations because it would "significantly affect the outcome of the suit." This assertion does not aid the company, since even if 1926.1050 was "substantive" it was not adopted because it was inconsistent with OSHA. Moreover, choice-of-law cases defining "substantive" broadly so as not to disrupt delicate Federal-State relations are scarcely apposite where the Federal Government has occupied the field and the question is whether a remedial Federal requirement applies at all. This is particularly true where the Secretary had explicitly defined a "substantive rule" as a standard requiring protective action by employers and was obviously relying on that definition here. Cf. 29 CFR 1910.2(f) with 1910.11(b) and .12(c), supra.

without notice or hearing only "established Federal standards," and both the Act and the Secretary's adoption notice defined such standards as safety or health regulations which were issued under other Federal statutes prior to April 1971 and which affirmatively required "conditions, or the adoption or use of one or more practices***necessary***to provide safe or healthful employment and places of employment." Supra, pp. 4-6. 12/ 1926.1050 not only fails to require such affirmative steps resulting "in improved safety or health for***employees," 29 U.S.C. 655(a), but would produce exactly the opposite effect. Accordingly, the Secretary could not have intended, and should not be held to have intended, to issue this limitation under OSHA section 6(a).

5. Finally, both legislative history and compelling policy considerations justify the instant result. As indicated supra n. 2, the purpose of section 6(a) was to permit the Secretary to establish an immediate uniform "nationwide minimum level of health and safety" for all employees covered by the statute. The reporting Committees repeatedly referred to the necessity to enforce OSHA obligations uniformly upon all covered employers in order to prevent compliance from being undermined by the anti-competitive effects of non-uniform enforcement. E.g., Leg. Hist. 144, 146, 847, 854. And this Court has noted

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12/ See 29 U.S.C. 655(a), 652(8) and (10); 29 CFR 1910.2(f) and (h), 36 Fed. Reg. 10466, 10468.

Congress' intent both to apply the Act uniformly to the outermost limits of the Commerce Clause and to supercede prior safety statutes and practices. Brennan v. OSHRC and John J. Gordon Co., 492 F.2d 1027, 1030 (C.A. 2, 1974); Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340, 1343 (C.A. 2, 1974). 13/ To hold that 1926.1050 permitted construction employers familiar with parallel pre-existing standards to ignore OSHA safety duties for the life of their contracts, but required newly covered construction employers immediately to comply with those requirements, would clearly be inimical to these purposes. This is particularly true where, as here, the Act being enforced has nothing to do with contractual relationships and such a contractual limit might leave workers on large ongoing projects effectively unprotected for years. Petitioner's claim to wholesale exemption from OSHA construction-safety standards should accordingly be rejected forthwith. An opposite result would "eviscerate the import of the [adopting regulations and]***rather than eliciting greater responsiveness on the part of employers would condone greater neglect." Brennan v. Southern Contractors Service and OSHRC, 492 F.2d 498, 501 (C.A. 5, 1974). 14/

13/ Cf. REA Express, Inc. v. Brennan and OSHRC, 495 F.2d 822, 826 (C.A. 2, 1974); Lee Way Motor Freight v. Secretary, 511 F.2d 864, 867-868 (C.A. 10, 1975).

14/ Underhill additionally asserts (Br., p. 7) that the instant result constitutes an "implied repeal" of 29 CFR 1926.1050 and that these effective-date provision must be strictly construed

(footnote continued)

CONCLUSION

For the above reasons the petition should be denied and the Commission's order affirmed and enforced in full. 29 U.S.C. 660(a).

Respectfully submitted,

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(footnote continued)
against the Secretary because OSHA is a criminal statute. With respect to the first assertion, the short answer is that 1050 is not repealed, but remains fully effective in the contractual CSA context for which it was promulgated. The Commission has merely held that this contractual limitation on employers' safety obligations was not imported to OSHA. With respect to the second contention, OSHA is a remedial civil statute, not a criminal or "penal" one. Frank Irey, Jr., Inc. v. OSHRC and Brennan, --- F.2d --- (C.A. 3, No. 73-1765, Nov. 4, 1974), unanimously affirmed en banc on this point, --- F.2d --- (July 24, 1975); Beall Const'n. Co. v. OSHRC and Brennan, 507 F.2d 1041, 1044 (C.A. 8, 1974); American Smelting and Refining Co. v. Brennan, 501 F2d 504, 515 (C.A. 8, 1974).

CERTIFICATE

I hereby certify that copies of the above brief were served this 30th day of July 1975 by appropriate mail upon the following counsel of record:

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